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FILED
AUG 16 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 368

SHEET METAL WORKERS' INTERNATIONAL UNION, AFL-CIO, LOCAL UNION 17,
PETITIONER,

v.

AETNA STEEL PRODUCTS CORPORATION ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, LOCAL UNION 33

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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Questions Presented

Whether under a national plan, voluntarily adopted by all the employers and unions party to this litigation, whereby comprehensive machinery is established for arbitration

and settlement of jurisdictional disputes among labor organizations, the decisions of the arbitration panel in an area admittedly within its substantive jurisdiction are subject to judicial review based on a claim that the arbitration panel violated its own procedural regulations.

Statutes Involved

The pertinent provisions of the National Labor Relations Act and of the Declaratory Judgment Act are set forth at pp. 1a-2a of the petition.

Statement

All parties to this litigation are also parties to an agreement entitled "Plan for Settling Jurisdictional Disputes Nationally and Locally" (National Plan) whereby certain international unions and employer associations have agreed to submit all jurisdictional disputes in the building and construction industry to the arbitration machinery of the National Joint Board for final determination binding on all parties. In the Boston area, where the instant dispute arose, the functions of the National Joint Board are performed by a Local Board subject to the appellate provisions of the National Plan (R. 143).[1] The Local Board is empowered to consider and decide cases of jurisdictional disputes and to make job assignment decisions. (Pet. 26a).[2]

On February 16, 1965, the Respondent Aetna Steel Products Corporation, a subcontractor working at the then-uncompleted Federal Office Building in Boston, assigned the work related to "movable steel partitions, convector covers,

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[1] Refers to Record Appendix filed by Petitioner in the Court of Appeals below.

[2] Refers to Petition for Certiorari filed in this Court.

pipe covers and related interior work around windows'' to the Respondent Carpenters Union (R. 4). On April 21, 1965, the Petitioner Sheet Workers Union protested to the Local Board the assignment by Aetna to the Carpenters of work on ''the installation of metal enclosures on metal Venetian blind pockets and convector covers'' (R. 15). There was no express protest on the assigned work related to these items enumerated in the protest. The Local Board decided that: ''The work in question is the work of the Sheet Metal Workers.'' (R. 6, 11, 17-18).

The somewhat ambiguous decision of the Local Board, characterized by the Court of Appeals, as both laconic and delphic, (Pet. 14a, 15a), made no mention of other work which Aetna had assigned to the Carpenters and which was related to the items enumerated in the Sheet Metal Workers protest. Nor did it resolve the Sheet Metal Workers' claims that its submission was intended to include three express items, rather than two[3], in addition to all work related thereto (R 31).

An appeal by the Carpenters Union from this decision was rejected as untimely as not having been made within two days of the decision as required under the National Plan (Pet. 34a). On June 20, the Petitioner claimed that Aetna was not assigning work pursuant to the Local Board's decision of April 27 as interpreted by the Petitioner and walked off the job in protest (R. 36). On July 2, 1965, Aetna assigned the work specifically designated in the Local Board's decision to the Sheet Metal Workers. Other work related to the disputed work was assigned to the Carpenters by Aetna (R. 8). The Petitioner Sheet Metal Workers adopted the position that the Local Board's assignment to the

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[3] At the District Court the Petitioner admitted that its original submission was limited to two items, but that it had subsequently made it clear to the Local Board, in the absence of the Carpenters, that it was actually claiming three items. (R. 116)

Sheet Metal Workers of the specific items involved in the dispute also covered "all work in connection therewith" and that Aetna's assignment of such related work to the Carpenters violated the Local Board's award (R. 8, 31). In protest over Aetna's assignment of related work to the Carpenters, the Sheet Metal Workers again called a strike at the work project from July 15 to July 27. This strike was settled by an interim agreement with the Sheet Metal Workers Union involving a massive change in assignment of work which had not previously been in dispute (R. 32).

On July 20, 1965, while the second strike was still in progress the business representative of the Sheet Metal Workers went to the Local Board and requested it to issue a clarification of its April 27 decision. The Local Board thereupon issued a decision directing all parties to comply with the terms of the April 27 decision (R. 23-24). Pursuant to the Appeals Board Procedural Regulations whereby such decisions on requests for clarification may be appealed to the Appeals Board (Pet. 33a), the Respondents Aetna and Carpenters Union filed timely appeals (R. 24-27). The Sheet Metal Workers protested the appeal, taking the position that the Local Board's assignment of specific work should govern all related work (R. 31).

On August 12, 1965, after a hearing where all parties were represented, the Appeals Board through its Chairman, Professor John T. Dunlop of Harvard University, unanimously awarded "the unloading, distribution and installation of convector enclosures comprised of sills and front pieces and grills" to the Sheet Metal Workers. The "unloading, distribution and installation of pipe enclosures, curve window trim and base, filler pieces behind plastered columns, venetian blind pockets and metal partitions" was awarded to the Carpenters (R. 15).

Although there is no provision for rehearing of Appeal Board decisions, the Sheet Metal Workers sought and ob-

tained a rehearing. On August 31, 1965, the Appeals Board requested a prompt ruling from the Joint Negotiating Committee established under the National Plan as to the propriety of the Appeals Board's procedure in accepting the appeal. Under the National Plan the Joint Negotiating Committee must approve the Appeals Board's promulgation of rules as to the types of case it will accept for review and must approve the Appeals Board's establishment of procedural regulations (Pet. 27a). Before any ruling was made by the Joint Negotiating Committee, the Petitioner filed suit in the District Court seeking an order to compel the employer to award the work to the Sheet Metal Workers Union and to render void the Appeals Board decision of August 12, 1965. The District Court dismissed the complaint as involving a dispute over procedural regulations of the arbitration panel which should be determined by the arbitrator rather than by the Court. On appeal, the Court of Appeals for the First Circuit unanimously affirmed on the ground, inter alia, that the question of the scope of review permissible to the Board of Appeals was one of contract interpretation to be decided exclusively by the arbitrator.

Argument

There is no issue warranting review by this Court. The decision below is so plainly correct and in accord with principles of law enunciated by this Court and with the decisions of other courts that there is no reason for granting the petition. The case raises no issue of general importance.

As both the District Court and the Court of Appeals noted, this dispute was the very type of dispute which the parties had agreed to submit to arbitration. The sole question involved in this petition is whether the procedures of

the National Plan require that every aspect of a jurisdictional dispute must be detailed in the original submission to the arbitrator in order for the arbitrator to deal with the jurisdictional problem in toto and whether the arbitrator is procedurally limited to a piecemeal consideration of the jurisdictional problem without considering other integrally related aspects of the actual problem before him.

The issue is complicated by the fact that the instant arbitration agreement involves an initial submission and hearing procedure followed by an appellate procedure within the arbitration machinery. It was inevitable that the instant situation, whereby the nature of the dispute was ineptly stated by the petitioner and had materially changed in the interim between the original submission and the appellate hearing, would arise. Between the original submission to the Local Board on April 21, 1965, and the ultimate hearing before the Appeals Board on August 11, 1965, there had been work stoppages and interim reassignments of work. Moreover, the decisions of the Local Board, termed by the Court of Appeals as "laconic" and "delphic" had been an active ingredient in the expansion of the jurisdictional dispute. Additionally, the scope of the formal dispute had been further expanded by the contention of the Sheet Metal Workers Union before the Board of Appeals that its original submission to the Local Board was intended to cover not only the specific job items enumerated therein but also additional items not enumerated and "all work in connection thereto". The practical question before the Appeals Board was whether, under its appellate procedure, it must treat matters as they stood April 21, 1965, or whether its procedures allowed it realistically to recognize the intervening deterioration of labor relations and the expansion of the scope of the jurisdictional dispute in fashioning its decision. The position adopted by the Petitioner would impose the strict limitations of common law pleading long

since abandoned by the Courts on arbitration proceedings whereby only the wording of the grievance as it stood on the date of submission and as generally filed by a layman could be considered by the arbitrator. Under such an overly legalistic limitation, the arbitrator would be forced to determine issues which, due to intervening circumstances, would be of only academic interest and would be of no assistance in the furtherance of industrial peace.

There is admittedly no question but that the disputed award was of the type authorized by the agreement. (R. 46) The only question is procedural, whether the machinery to allow the Board to consider the full dispute was properly triggered by the wording of the original submission to the Local Board.

This Court has previously ruled that such questions going to the issue of the sufficiency of the manner in which a grievance or dispute was filed is for the arbitrator rather than for the Courts to decide. *John Wiley & Sons* v. *Livingston,* 376 U.S. 543. The arbitration panel having ruled that the correct procedure had been invoked to present the substantive issue to arbitration, the courts below quite properly refused to interfere with that ruling.

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 557.

This Court by prior rulings has not only made it clear that such procedural questions are not to be decided by the courts but has affirmatively declared it the clear duty of the arbitrator to go beyond the strict limits of the particular contractual issues where necessary to fashion a realistic

judgment which will further the goal of uninterrupted production under the agreement.

> "Arbitration is the means of solving the unforeseeable by moulding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement . . . The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement . . ." *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574.

Such other factors as consumer interest and the efficiency and economy of operation may be considered by the express terms of the National Plan (Pet. 28a). No claim has been presented in the petition or in the courts below that the arbitrator has violated his duty to effect a peaceful settlement of the dispute consistent with the efficiency of operation or that the arbitrator exceeded the general authority

granted him to decide jurisdictional disputes. It would be quite inconsistent with this Court's concept of arbitration as having preventive therapeutic value, *Carey* v. *Westinghouse Electric Co.*, 375 U.S. 261, 272; *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 568, if the arbitrator were limited to a partial award knowing that, due to intervening events, it would soon be vitiated by disputes over work integrally related to the dispute. The arbitrator should not be thus placed in a position where his decision would create rather than settle labor disputes. Labor unions and employers would have confidence in the arbitration of jurisdictional disputes only if the arbitrator is empowered to exercise a knowledgable judgment over the dispute in a manner that will not invite disputes over integrally related work.

> "[A]rbitration would be a constricted, dying institution if it were limited to the definition of terms. [Courts] should allow the arbitrator to exercise the creative role his function demands always confining him within the scope of the contract." Cox, "Reflections Upon Labor Arbitration;" 72 *Harv. L. Rev.* 1482, 1512 (1959)

Accordingly, the mere fact that, in order to present a full and just determination of the dispute insofar as it concerned some work, it was necessary for the arbitrator to reassign other integrally-related work is not a sufficient basis for vacating the arbitrator's award. Indeed, in view of the inflammable labor relations at this job site, this course should be encouraged rather than condemned. Moreover, the position of the Petitioner before the Appeals Board had consistently been that the arbitrator is empowered to award jurisdiction not only over the disputed items particularized in a submission but also over all work

connected with such items. (R. 31). The Board of Appeals did no more than to accept this general principal of jurisdictional disputes and proceeded to award work connected with the particularized items.

Of course the Petitioner may disagree with the arbitrator's determination as to which work is sufficiently related to the items in the original submission so as to be covered by that submission and thus within his jurisdiction, but that is a matter going to the merits of the dispute and is clearly not a proper subject for judicial review.

> "[S]o far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599.

It is equally clear that such questions as whether metal partitions and filler pieces behind plastered columns are items sufficiently connected with the installation of metal enclosures on convector covers so as to be included in consideration of the arbitration submission may not serve as the proper basis for a Petition for Certiorari as "review would be of no importance save to the litigants themselves" and "this Court does not sit for the benefit of particular litigants". *Rudolph* v. *United States*, 370 U.S. 269, 270; *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74.

The protest (Pet. 10) now emanating from the Petitioner in invoking the certiorari power of this Court, that the arbitrator's decision could disrupt the confidence parties would ordinarily place in arbitration proceedings is indeed inconsistent with the Petitioner's prior actions in engaging in two work stoppages prior to the award, particularly

when it is considered that such stoppages are prohibited by the National Plan, which the Petitioner now claims to be protecting (Pet. 30a).

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

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